

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 867 OF 2004

Kirti Mansukhlal Turakhia & anr.

... Appellants.

Versus.

The Municipal Corporation for  
Greater Mumbai and another.

... Respondents.

Shri P.M.Shah for the Appellants.

Ms.Geeta Joglekar for the Respondent No.1.

Shri Dhaval Mehta for the Respondent No.2.

CORAM : ABHAY S. OKA, J.

DATED : 26th April, 2005.

P.C.:

1. Heard the learned Counsel appearing for the parties. This Appeal from order is preferred by the original Plaintiffs taking exception to a part of the order dated 19th July 2004 passed by the learned trial Judge on the Notice of Motion taken out by the Appellants/Plaintiffs.

2. The suit is filed by the Appellants praying for the following reliefs:

"(b) This Hon'ble Court may be pleased to pass a mandatory order directing the Defendant No.1 to produce the sanctioned plan in respect of the proposed new lift to be erected in the said building i.e. Plot No.26, Kirti Kunj, K.A.Subramaniam Road,

Matunga, Mumbai 400 019, in this Hon'ble Court and furnish the copy of the said sanctioned plan to the Plaintiffs at the Plaintiffs' expenses;

- (c) This Hon'ble Court may be pleased to pass a permanent injunction order restraining the Defendants, their servants and agents and persons claiming through them from commencing and/or proceeding with further work of any nature whatsoever pertaining to the affixing and/or erection of the lift in the said building i.e. Kirti Kunj, K.A.Subramaniam Road, Matunga, Mumbai 400 019, if after perusal of the original sanctioned plan in respect of the proposed lift to be erected in the said building, it is found that there is no provision of any opening is made available for making legitimate use of the said proposal lift the Plaintiffs and other tenants and occupants of the said building Kirti Kunj, K.A.Subramaniam Road, Matunga, Mumbai 400 019, save and except opening available for Defendant No.2 on third floor in the said building;

- (d) This Hon'ble Court may be pleased to pass

permanent mandatory injunction order  
restraining the Defendant No.2, his  
servants, agents, and persons claiming  
through Defendant No.2 from creating  
obstruction of any nature whatsoever in  
respect of availing the facility of lift,  
more particularly by evolving a mechanism  
in which the proposed lift will stop only  
at third floor on which the Defendant No.2  
is residing along with his family members,  
if it is found that separate opening are  
available for making legitimate use of the  
proposed lift on each floor for all the  
tenants and occupants including the  
Plaintiffs and their family members and  
Defendant No.2;

- (e) Pending the hearing and final disposal of  
the suit, this Hon'ble Court may be  
pleased to direct the Defendant No.1 to  
produce the sanctioned plan in respect of  
the proposed new lift to be erected in the  
said building i.e. plot No.26, Kirti  
Kunj, K.A.Subramaniam Road, Matunga,  
Mumbai 400 019 in this Hon'ble Court and  
furnish the copy of the said sanctioned  
plan to the Plaintiffs at the Plaintiffs'  
expenses."

The Notice of Motion was taken out by the Appellants/ Plaintiffs. The first prayer in the Notice of Motion is for a direction to the Respondent No.1/Defendant No.1 to produce sanctioned plan in respect of lift. The second prayer is for restraining the Respondent No.2 from commencing and/or proceeding with the work of installation of lift. The third prayer is for restraining the Respondent No.2 from creating any obstruction of whatsoever nature to the Appellants in availing the facility of the lift, more particularly by evolving a mechanism in which the proposed lift will stop only on the third floor in which the second Respondent is residing with his family members.

3. The Appellants and the Respondent No.2 are residing in the same building. The Appellants are residing on the 2nd floor and the Respondent No.2 is residing on the third floor of the same building. It is not in dispute that the Respondent No.2 has installed the lift. In the Notice of Motion filed by the Appellant ad-interim order was passed directing the Appellants to deposit a sum of Rs.1 lakh in the trial Court and further directing them to deposit a sum of Rs.4000/- with the Respondent No.2. Subject to the deposit of the said amounts, the Respondent No.2 was directed to allow the use of the lift by the Appellants and their family members. The learned trial Judge by the impugned order while granting

temporary injunction against the Respondent No.2 restraining him from creating any obstruction in the use of the lift by the Appellants directed that the injunction will operate if the Appellants will make payment of their share in the cost incurred for installing the lift. The learned trial Judge quantified the cost incurred for installation of the lift at Rs.9,50,000/-.

4. The learned Counsel appearing for the Appellants submitted that the building is a property of Bai Kamlavati Mansukhlal Trust, a private Trust, and the Respondent No.2 could not have used the property to his advantage. He submitted that initially the Respondent No.2 claimed that he had incurred a total expenditure of Rs.11,42,562/- for installing the lift and later on he claimed that the expenses were to the tune of Rs.9,50,000/-. He submitted that there is no evidence on record to show that the expenditure incurred is to the tune of Rs.9,50,000/- by the Respondent No.2. He submitted that the learned Judge could not have directed the Appellants to contribute by assuming that the cost incurred was Rs.9,50,000/-. He submitted that the quantum of cost incurred for installation of the lift will have to be decided on evidence. He submitted that there are other persons in occupation of the premises in the said building and therefore, the Appellants could not have been directed to share the expenses.

4. The learned Counsel appearing for the Respondent No.2 submitted that a just and equitable order has been passed by the trial Court and no interference is called for.

5. I considered the rival submissions. It is not in dispute that the lift is installed by the Respondent No.2 by spending his money. It is also not in dispute that in view of the ad-interim order passed in the Notice of Motion the Appellants deposited the requisite amount of Rs.1,00,000/- and started utilising the facility of the lift.

6. Apart from the amounts which are deposited by the Appellants in compliance with the ad-interim order passed by the trial Court, no other amount has been spent by the Appellants on account of installation of the lift. The learned trial Judge did not accept the case of the Respondent No.2 that he had spent a sum of Rs.11 lakhs and more for installation of the lift. The learned trial Judge took a prima-facie view that the expenditure incurred was Rs.9,50,000/-. The learned trial Judge also noted that the maintenance expenses will be incurred on the operation of the lift. He observed that the payment of electricity charges will have to be made. The lift will also have to be maintained. All that the trial Court did was to direct

the Appellants to pay their share in the approximate cost of installation of lift which was quantified at Rs.9,50,000/- as a condition precedent for the Appellants using the lift. In the operative part of the order, there is no reference regarding the sharing of the expenses. However, in paragraph 15 of the Judgment, the learned trial Judge has observed that the parties will have to share expenses for maintenance of the lift.

7. The order of temporary injunction is a discretionary and an equitable relief and the scope of an Appeal under Order 43 Rule 1 of the Code of Civil Procedure, 1908 is limited. The law on this point is no longer res-integra. It is a settled law that no interference can be made with a discretionary order only because some other view of the matter is possible. Considering the fact that the lift has been installed by the Respondent No.2 by spending substantial amount, the trial Court has passed a just and equitable order permitting the Appellants to use the lift by sharing the expenditure incurred in installation of the lift and also by sharing of the expenditure which is required for maintenance of the lift. It cannot be ignored that initially objection was raised by the Appellants for installation of the lift itself and there is a challenge to the sanctioned plan and the permission granted by the Respondent No.1-Corporation for the installation of the lift. In spite of the said stand taken by the Appellants, the

learned trial Judge has passed an equitable order which will enable the Appellants to use the facility of the lift subject to paying contribution. The amount of Rs.9,50,000/- is quantified as total expenditure incurred on prima-facie consideration of the material on record. The payments which are ordered to be made by the trial Court are naturally subject to the final result and further order in the suit. In the final decision in the suit, adjustment can always be ordered to be made after determination of the actual expenditure incurred on the lift. There is no merit in the Appeal. No interference is called for. The Appeal is dismissed with no order as to costs.

Judge.